STATE OF MICHIGAN

IN THE SUPREME COURT

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GARY AND KATHY HENRY, et al.,

Plaintiffs-Appellees,

v

THE DOW CHEMICAL COMPANY,

Defendant-Appellant.
_____/

Supreme Court No. 125205

Court of Appeals No. 251234

Saginaw County Circuit Court
Case No. 03-47775-NZ


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# *AMICUS CURIAE* BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF THE POSITION OF DEFENDANT-APPELLANT THE DOW CHEMICAL COMPANY

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## STATEMENT OF RELIEF SOUGHT

The Product Liability Advisory Council, Inc. (the "Advisory Council") files this *amicus curiae* brief in support of the position taken by Defendant-Appellant, The Dow Chemical Company ("Dow"). The Advisory Council respectfully requests that this Court reverse the decision of the trial court and dismiss Plaintiffs' claims for medical monitoring.

## QUESTION PRESENTED FOR REVIEW

**1. Should this Court create a common law cause of action for medical monitoring?**

The Court of Appeals did not address this question.

The trial court answered: Yes

The Advisory Council answers: No

Authority: *Sizemore v Smock*, 430 Mich 283, 299; 422 NW2d 666, 674 (1988) ("It is clear to us that further extension of a negligent tortfeasor's liability involves a variety of complex social policy considerations. In light of these concerns, we believe that the determination of whether this state should further extend a negligent tortfeasor's liability for . . . damages should be deferred to legislative action rather than being resolved by judicial fiat.").

## INTRODUCTION

Plaintiffs urge this Court to create a brand new common law cause of action that has never existed in more than 150 years of this Court's jurisprudence—a claim for medical monitoring. This proposed cause of action raises a broad variety of public policy considerations and complex social consequences, as even Plaintiffs candidly admit. (Pls' Answer to Emergency App for Leave to Appeal at 14 ("[A claim for m]edical monitoring . . . implicates numerous legal and public policy concerns because medical monitoring stands at the intersection of traditional tort law and new complex types of latent toxic harm.").)

This Court need not decide whether a cause of action for medical monitoring is an appropriate vehicle for addressing claims like those Plaintiffs pursue in this lawsuit. That is because Michigan's citizens created in the State Constitution a mechanism for dealing precisely with vexing policy questions like those presented here: legislation. *See* Const 1963, art 4, § 1 (vesting the legislative power in the State Senate and House). This Court has wisely recognized that determinations of where to draw lines of legal liability and how to assess intangible damages are policy questions "more appropriately left to the Legislature." *Sizemore v Smock*, 430 Mich 283, 293, 299 n 27; 422 NW2d 666 (1988). The Legislature also has greater access to social and medical information, and it is particularly well-suited to receive testimony from the multitude of perspectives that are essential to balance and resolve complex social policies. Accordingly, the Advisory Council respectfully requests that this Court refuse Plaintiffs' invitation to create a new Michigan cause of action for medical monitoring, and that the Court reverse the trial court and dismiss Plaintiffs' medical monitoring claims.

## STATEMENT OF PROCEEDINGS AND FACTS

The facts relevant to the legal issue presented are as follows:

1. Plaintiffs filed this class action lawsuit seeking, in part, the establishment of a court-administered medical monitoring trust fund for the maintenance of a medical monitoring program. (Third Am Compl ¶¶ 205-219.)

2. On August 18, 2003, the trial court denied Dow's motion for summary disposition with respect to Plaintiffs' medical monitoring claims.

3. On October 29, 2003, a panel of the Michigan Court of Appeals denied Dow's Emergency Application for Leave to Appeal in a 2-1 decision.

4. Dow timely filed its Application for Leave to Appeal to this Court, and on June 3, 2004, this Court granted the Application.

5. The sole issue presented to this Court is whether a common law cause of action for medical monitoring should be created. (Pls' Answer to Emergency App for Leave to Appeal at 8 ("The Michigan Supreme Court has never undertaken an examination and analysis of medical monitoring claims and has, therefore, never declared whether it is a valid legal theory under Michigan law.").

## STANDARD OF REVIEW

This Court reviews *de novo* whether a claim is legally actionable. *Mack v Detroit*, 457 Mich 186, 193, 197; 649 NW2d 47 (2002); *Page v Klein Tools Inc*, 461 Mich 703, 709; 610 NW2d 900 (2000). This Court also reviews *de novo* the trial court's decision denying Dow's motion for summary disposition, since the motion tests the legal sufficiency of a claim on the basis of the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

## ARGUMENT

### I. The decision to recognize a cause of action for medical monitoring should be left to the Michigan Legislature.

This Court has often stated that its constitutional duty is to interpret the law, not create it. *See, e.g., Mayor of the City of Lansing v Mich Pub Serv Comm'n*, 470 Mich 154, 161; 680 NW2d 840 (2004) ("[The Court's] task, under the Constitution, is the important, but yet limited, duty to read into and interpret what the Legislature has actually made the law.") (citation omitted); *Glancy v Roseville*, 457 Mich 580, 590; 577 NW2d 897 (1998) ("The responsibilities for drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature's, not the judiciary's.") (quotation omitted). Nowhere does that observation carry more force than in situations like the present one, where the Court is asked to adopt a policy-making role and preemptively create a new common law cause of action where one does not currently exist. Regardless of the various arguments for and against the recognition of a claim for medical monitoring, it is for the Legislature and not the courts to ultimately answer the many complex medical and social issues that Plaintiffs raise in their claims. Accordingly, Plaintiffs' request should be denied.

#### A. This Court frequently rejects requests to recognize new causes of action.

This Court has a long history of rejecting plaintiff requests to create new causes of action in Michigan. In *Sizemore v Smock*, 430 Mich 283, 422 NW2d 666 (1988), for example, the plaintiffs asked this Court to recognize a parent's action for the loss of a child's society and companionship when the child is negligently injured. This Court rejected the plaintiffs' request, concluding that recognition of such a claim was best left to the Legislature for a number of reasons. First, "the law cannot redress every injury, and the determination of where to draw the

line of liability is essentially a question of policy." *Id.* at 293; 422 NW2d 666. Second, "[f]orseeability of injury alone does not mandate recognition of a cause of action. Social policy must intervene at some point to limit the extent of one's liability." *Id.* Third, the "intangible character" of the loss of consortium "raises difficulty with the proper measurement of damages and creates an unwarranted risk of allowing double recovery." *Id.* at 294; 422 NW2d 666.

Fourth, "[t]here is a limit to the range of injuries and the dollar amount of recovery which can be spread across society through the interaction of the tort litigation and insurance systems." *Id.* at 295; 422 NW2d 666 (quotation omitted). Ultimately, the burden for paying such new awards "will be borne by the general public." *Id.* Fifth, drawing the line of liability is difficult, and there is no clear answer as to where the line should be drawn. *Id.* Finally, "further extension of a negligent tortfeasor's liability involves a variety of complex social policy considerations." *Id.* at 299.

In light of these concerns, this Court held that the determination of whether to recognize the new cause of action requested "should be deferred to legislative action rather than being resolved by judicial fiat." *Id.*; 422 NW2d 666. *Accord Page v Klein Tools Inc*, 461 Mich 703, 710-711, 715-716; 610 NW2d 900 (2000) (declining to recognize new cause of action for negligent instruction or educational malpractice where no conceivable rule of liability could be established and there was "no reasonable degree of certainty that . . . plaintiff suffered injury within the meaning of the law of negligence") (quotation omitted); *Weymers v Khera*, 454 Mich 639, 654-655; 563 NW2d 647 (1997) (refusing to recognize cause of action for the loss of an opportunity to avoid physical harm less than death because legal responsibility for such a claim is assigned based on the mere possibility that a tortfeasor's negligence resulted in the ultimate harm); *Newman v Detroit*, 281 Mich 60, 63; 274 NW 710 (1937) (rejecting extension of survival

act to child injured before birth, directing appellee to take to the legislature the argument that every wrong should have a remedy); *Ryan v Towar*, 128 Mich 463, 479-480; 87 NW 644 (1901) (rejecting request to extend landowner's duty of care to trespassers, holding that "however Draconic the common-law rule may be considered, it is the province of the courts to enforce it until changed by the legislature. . . . [A]side from the impropriety of judicial legislation, a wise public policy should forbid such a sweeping innovation by judicial main strength.").

### B. The decision to recognize a cause of action for medical monitoring is fraught with complex and controversial public policy decisions best left to the Legislature.

All of the reasons this Court has articulated for deferring to the Legislature on questions of policy-making apply here. Like the asserted loss of consortium claim in *Sizemore*, it is impossible for this Court to draw a meaningful liability line in medical monitoring cases without engaging in judicial legislating. While some courts have required medical monitoring plaintiffs to show an "increased risk" of disease, *see, e.g., Hansen v Mountain Fuel Supply Co*, 858 P2d 970, 979 (Utah 1993), others have required plaintiffs to show to a "reasonable certainty" that the plaintiffs would develop the need for medical monitoring, *see, e.g., Potter v Firestone Tire & Rubber Co*, 863 P2d 795 (Cal, 1993). The Michigan Court of Appeals in *Meyerhoff v Turner Construction Co*, 210 Mich App 491; 534 NW2d 204 (1995), took yet another tack, holding that medical monitoring plaintiffs state a claim where medical surveillance is "reasonable and necessary," in light of "the relative increase in the chance of onset of disease in those exposed." *Id.* at 495; 534 NW2d 204. It does not matter which, if any, of these variant standards should be applied; the question is one of public policy. And the institution endowed with the right and responsibility of deciding policy questions is the Michigan Legislature.

Also like *Sizemore*, the relief requested here is uncertain and intangible. It is unclear, for example, what percentage, if any, of the proposed class will eventually be afflicted

with an actual disease. Every plaintiff in the proposed class is currently asymptomatic. As this Court held in *Larson v Johns-Manville Sales Corp*, 427 Mich 301; 399 NW2d 1 (1986), a claim does not even accrue in cases claiming exposure to a toxin until there is actual injury in the form of a measurable medical harm, such as the development of cancer. *Id.* at 308-319; 399 NW2d 1. It is for the Legislature to decide, therefore, if medical monitoring claims should be allowed before the development of a measurable medical harm.

Recognizing a new medical monitoring cause of action also raises the prospect of double recoveries. Payments under Plaintiffs' proposed court-administered trust fund will undoubtedly overlap with claims from health and medical insurance. Should such payments be reduced under the collateral source principle articulated in MCL 600.6303? Or would such a reduction unfairly shift the costs of medical monitoring to health providers and the insured (through greater premiums)? Again, such questions must be addressed by the Legislature, not the courts.

A court-administered trust fund for medical monitoring raises a number of other thorny policy issues as well:

(1) How should costs and benefits be weighed? Do the costs in money and invasiveness outweigh the benefit of testing in light of the test's predictive value? Are the state's health dollars better spent on the proposed monitoring or on other preventive or curative health measures involving different diseases?

(2) What is the cost to the Michigan court system and to Michigan citizens and businesses? The United States Supreme Court in *Metro-North Commuter Railroad Co v Buckley*, 521 US 424 (1997), recognized that allowing claims for medical monitoring without proof of a present physical injury may open the door to a "flood" of claims. *Id.* at 442. It is easy

to see why. The United States Environmental Protection Agency estimates that approximately 41 million U.S. residents live within four miles of a hazardous waste site on the National Priority List, Johnson & DeRosa, *The Toxicologic Hazard of Superfund Hazardous Waste Sites*, 12-4 Reviews on Envt'l Health, pp 235-251 (located at http://www.atsdr.cdc.gov/toxhazsf.html); more than 21 million Americans may have been exposed significantly to asbestos, *Jackson v Johns-Manville Sales Corp*, 750 F2d 1314, 1312 (CA 5, 1985); and almost every American has been exposed to second-hand smoke from cigarettes, and yet cigarette exposure has already been the basis for medical monitoring claims in other jurisdictions, *see, e.g., Barnes v American Tobacco Co*, 161 F3d 127, 130-131 (CA 3, 1998).

(3) Is it fair to impose catastrophic amounts of liability under a new cause of action based solely on past conduct? Whereas judicial decisions are presumed to operate retroactively, *Pohutski v Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002), a statutory solution is presumed to operate only prospectively, *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001). If Michigan's tort system is to be reformed to include a new cause of action for medical monitoring, questions of retroactivity must be addressed. *Cf. BMW of N Am, Inc v Gore*, 517 US 559, 574 (1996) ("[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to [liability]").

(4) If a plaintiff prevails in a medical monitoring action, what happens when cancer or some other disease develops? This Court in *Larson* specifically declined to address whether a claimant who files suit to recover for asbestosis may later file a second suit for cancer, 427 Mich at 305 n 1; 399 NW2d 1, but it did note that generally "subsequent damages do not give rise to a new cause of action," and that damages based on "future consequences" must be shown with

"reasonable certainty." *Id.* at 315, 317; 399 NW2d 1 (citations omitted). Should these two long-standing legal principles be changed or abandoned if a new cause of action for medical monitoring is created?

(5) Assuming a limited availability of funds, who should receive compensation as between asymptomatic plaintiffs exposed to a substance that may only possibly cause illness, and those who actually develop a full-blown disease? Allowing a medical monitoring claim could result in the drastic reduction of compensation available for those with serious, life-threatening illnesses. Who is empowered with the authority to decide whether these dollars are best spent on detection rather than treatment?

(6) What is to be done about class actions? It should be expected that most new claims for medical monitoring will be brought in the guise of a proposed plaintiff's class. But the need for medical monitoring is a case-specific inquiry that depends on length and intensity of exposure, personal health characteristics, genetic makeup, and the like. Should the Michigan Court Rules' requirement of typicality, *see* MCR 3.501(A)(1)(c), be preserved or waived in these circumstances?

All of these questions must be investigated, examined, and answered before it is appropriate to even consider whether Michigan should recognize a medical monitoring cause of action. And whereas the courts are limited to witness testimony presented in the form of a case or controversy, the Legislature has access to unlimited sources of information and can seek the views of persons representing a multitude of policy perspectives.

### C. Experience demonstrates the prudence of this Court exercising restraint.

In a recent decision, *Bourgeois v AP Green Industries*, 716 So 2d 355 (La, 1998), the Louisiana Supreme Court ignored the role of Louisiana's legislature as the policy-maker for

that state. Instead, the court took it upon itself to resolve the many sensitive and complex medical and social issues that medical monitoring claims raise. The Louisiana legislature responded in predictable fashion; less than one year later, it effectively overruled *Bourgeois* by passing a statute requiring physical injury before allowing plaintiffs to pursue medical monitoring claims. La Civ Code Art 2315 (2000) (excluding costs for medical treatment or surveillance unless directly related to a "manifest physical or mental injury or disease"). In other words, the time, effort, and resources the Louisiana Supreme Court expended in analyzing the propriety of medical monitoring claims were rendered completely nugatory by the subsequent legislative process. The court, the parties, and Louisiana citizens all would have been much better served if the court had simply stayed its hand and allowed the legislative process to take its course. This Court should likewise defer to Michigan's Legislature in this case involving issues of such obvious public debate.

## II. Decisions of non-Michigan courts and the risk to Michigan's economy likewise counsel against the recognition of a new Michigan cause of action for medical monitoring.

Wholly aside from the wisdom of allowing the Legislature to address the admittedly complex competing policies implicated by a medical monitoring cause of action, there are additional and independent reasons for rejecting the doctrine entirely, as numerous courts outside Michigan have held. Moreover, the potential cost of a new medical monitoring cause of action to Michigan employers, employees, and the economy reiterates the need for a policy-making branch of the government to thoughtfully consider this issue.

### A. The United States Supreme Court and courts in other states have rejected medical monitoring claims.

In *Metro-North Commuter Railroad Co v Buckley*, 521 US 424 (1997), the United States Supreme Court ruled 7-2 against allowing a medical monitoring claim that a pipefitter

brought against his employer under the Federal Employers' Liability Act (FELA) for occupational exposure to asbestos. The plaintiff had literally been covered with asbestos while doing work for the railroad employer.

The Court in *Buckley* addressed a number of the serious policy concerns militating against adoption of a medical monitoring cause of action. The Court observed that it could be difficult for judges and juries to identify which medical monitoring costs are "extra" expenses, over and above the preventative medicine ordinarily recommended for everyone. *Id.* at 441. The Court also noted that medical professionals often give conflicting testimony as to the benefit and appropriate timing of testing and treatment, making it difficult to determine accurately whether and what type of medical surveillance is necessary. *Id.* Finally, the Court recognized that it is difficult, if not impossible, to determine who should be eligible for medical monitoring, because such monitoring is prudent for many people, even those without exposure to alleged toxins. *Id.* at 442.

Based on these problems, the Court expressed its concern that medical monitoring would permit "tens of millions of individuals" to justify "some form of substance-exposure-related medical monitoring." *Id.* Defendants in turn would be exposed to unlimited liability, and a "flood" of monitoring cases would drain the resources available for plaintiffs with serious, present injury. *Id.* The Court rejected the suggestion that medical monitoring awards are not costly, and concluded by expressing doubt that the judicial system was the appropriate forum for such claims: "[W]e are . . . troubled . . . by the potential systemic effects of creating a new, full-blown tort law cause of action—for example, the effects upon interests of other potential plaintiffs who are not before the court and who depend on a tort system that can distinguish

between reliable and serious claims on the one hand, and unreliable and relatively trivial claims on the other." *Id.* at 443-444.

Courts in other states have followed *Buckley*, similarly rejecting claims to create new common law causes of action for medical monitoring. *See, e.g., Badillo v Am Brands Inc*, 16 P2d 435, 440 (Nev, 2001) (rejecting request for a "court supervised medical monitoring program" because creating a cause of action is "generally a legislative, not a judicial, function"); *accord Trimble v Asarco Inc*, 83 F Supp 2d 1034 (D Neb, 1999), *aff'd*, 232 F3d 946, 1041 (CA 8, 2000) (refusing to recognize cause of action for medical monitoring or a remedy involving the creation of a medical monetary fund where there was no pending or prospective legislation to authorize such a cause of action or remedy and it was "improbable" that the Nebraska courts would judicially fashion such a right or remedy"); *Carroll v Litton Sys Inc*, 1990 WL 3120969, at *5 (WDNC, Oct 29, 1990), *aff'd in part and rev'd in part*, 47 F3d 1164 (CA 4, 1995) (North Carolina court would not create common law claim for medical monitoring costs, but would instead look to the legislature for guidance); *Ball v Joy Mfg Co*, 755 F Supp 1344, 1372 (SD W Va, 1990), *aff'd*, 958 F2d 36 (CA 4, 1991) (recognizing that finite resources must be spent wisely because "[a]llowing today's generation of exposed but uninjured plaintiffs to recover may lead to tomorrow's generation of exposed and injured plaintiff's [sic] being remediless"); *Purjet v Hess Oil Virgin Islands Corp*, 1986 WL 1200, at *4 (DVI, Jan 8, 1986) (plainitffs' claims for medical monitoring damages were invalid because plaintiffs could not demonstrate actual injury). This Court should decline to create a new medical monitoring cause of action as well.

### B. Medical monitoring claims will have a disastrous effect on the Michigan manufacturers that power the State economy.

As already noted, virtually every citizen in the country has been exposed at some time, somewhere, to a substance that can be traced to a manufacturer. The scope of the potential

flood of litigation that will be unleashed in the event Michigan recognizes a claim for medical monitoring has been demonstrated vividly in Louisiana. Following the Louisiana Supreme Court's decision in *Bourgeois* and before the Louisiana legislature amended the state statute, a state court certified as a class all Louisiana residents who were cigarette smokers on or before May 24, 1996, provided each claimant started smoking on or before September 1, 1988. *Scott v Am Tobacco Co*, 725 So 2d 10 (La Ct App, 1998). And there seems to be no reason why an even larger class of claimants exposed to second-hand smoke could not have brought a similar action based on *Bourgeois*. The potential ramifications to Michigan's manufacturing employers and employees, not to mention the state economy, again emphasize the public policy choices that can be addressed appropriately through legislation.

## CONCLUSION

There is currently great debate in academic literature and among the various state and federal courts about the propriety of recognizing a new cause of action for medical monitoring. Although the Advisory Council ultimately believes that important policy concerns dictate against such recognition, whether Michigan should endorse medical monitoring claims is a question for the Legislature to resolve. This Court has a long and storied tradition of exercising its restraint and allowing new causes of action to be created by the Michigan Legislature, as the citizens intended when they ratified the State Constitution. That restraint should be exercised here, allowing the competing social, medical, and public policies at issue to percolate in the legislative process, the governmental branch that the people have designated as the State's policy-maker. For all of these reasons, this Court should deny Plaintiffs' request to create a new

common law cause of action for medical monitoring, reverse the trial court's decision, and dismiss Plaintiffs' medical monitoring claims.

Date: July 29, 2004

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District Court of the Virgin Islands, Division of St. Croix.

David Frank PURJET, individually, and as father and next friend and friend of Carrie Renee Purjet, Plaintiff,
v
HESS OIL VIRGIN ISLANDS CORPORATION, the Litwin Corporation, Amerada Hess Corporation, St. Croix Petro-Chemical Corporation, Keene Corporation, Owens-Corning Fiber-Glass Corporation and XYZ Asbestos Manufacturing and Distributing Corporation, Defendants.

**Civ. No. 1985/284.**

Jan. 8, 1986.

Edward Haskins Jacobs, Jacobs & Brady, Christiansted, St. Croix, U.S. Virgin Islands, for plaintiff.

Lee J. Rohn, Britain H. Bryant, Christiansted, St. Croix, U.S. Virgin Islands, for defendant Hess Oil Virgin Islands Corp.

MEMORANDUM OPINION AND ORDER

DAVID V. O'BRIEN, District Judge.

***1** This motion for summary judgment requires us to decide whether exposure to asbestos alone is sufficient to state a cause of action in the Virgin Islands. For the reasons stated herein, we hold it does not.

I. FACTS

Plaintiff David Frank Purjet worked as an insulation supervisor for Litwin Panamerican Corp. for two years. He alleges that over the course of his employment he was repeatedly exposed to asbestos at the St. Croix refinery of defendant Hess Oil Virgin Islands Corp. ("HOVIC"). Purjet also brings suit on behalf of his daughter, Carrie Renee Purjet, alleging she was exposed to the asbestos that he inadvertently brought home on his clothing.

It is undisputed that the plaintiffs are not presently suffering from an asbestos-related disease. Rather, their suit is grounded on the consequences of the lengthy latency period of these ailments.

HOVIC brought this motion for summary judgment on the ground that the plaintiffs have failed to state a legally cognizable claim.

II. DISCUSSION

The plaintiffs have asserted four causes of action: enhanced risk of developing an asbestos-induced disease; intentional and negligent infliction of emotional distress as a result of the enhanced risk, and the need to undergo diagnostic screening.

A. *Enhanced Risk*

Actual injury or damage is an essential element of a tort cause of action. Restatement (Second) of Torts § 7; W. Prosser and P. Keeton on Torts (5 ed.1984) at 165. The Purjets ask us to dispense with this requirement because the claim of enhanced risk seeks present damages for a possible future injury.

Courts examining claims arising from exposure to carcinogens have consistently dismissed the cases pending manifestation of an injury related to the exposure. In *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.1985), the Third Circuit rejected the contention that exposure to asbestos alone stated a cause of action under the Federal Employers' Liability Act ("F.E.L.A."). *Schweitzer* involved asbestosis suits which were filed after the plaintiffs' employer had consummated reorganization. As railroad workers, the plaintiffs were required to follow F.E.L.A. regulations which define non-dischargeable claims as those in existence prior to the consummation of the employers' reorganization. In dismissing the case, the court stated:

> [S]ubclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law.

*Id.* at 942.

The court also found that policy prevented a contrary result.

> Moreover, we are persuaded that a contrary rule would be undesirable as applied in the asbestos-related tort context. If mere exposure to asbestos were sufficient to give rise to a F.E.L.A. cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious that proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do. Requiring manifest injury as a necessary element of an asbestos-related tort action avoids these problems and best serves the underlying purpose of tort law: the compensation of victims who have suffered. Therefore we hold that, as a matter of federal law, F.E.L.A. actions for asbestos-related injury do not exist before manifestation of injury.

***2** *Id.* at 942.

Similarly, in *Mink v. University of Chicago,* 460 F.Supp. 713 (N.D.Ill.1978), the court held that a risk of cancer stemming from ingestion of diethylstilbestrol ("DES") would not state a products liability claim in the absence of a concrete physical injury. *Id.* at 719. *See also Morrissy v. Eli Lilly & Co.,* 76 Ill.App.3d 753, 32 Ill.Dec. 30, 394 N.E.2d 1369, 1376 (1979) ("exposure to DES *in utero* and the possibility of developing cancer or other injurious conditions in the future is an insufficient basis upon which to recognize a present injury."); *Ayers v. Jackson Township,* 189 N.J.Super. 561, 461 A.2d 184, 186-88 (N.J.Super.Ct.Law Div.1983) *rev'd on other grounds,* 202 N.J.Super. 106, 493 A.2d 1314 (N.J.Super.App.Div.1985) (distinguishing enhanced risk cases where underlying injury was manifest).

Since it is undisputed that the plaintiffs are presently free of any asbestos-related disease, we hold that their claim for enhanced risk fails to state a legally cognizable cause of action.

B. *Emotional Distress*

The plaintiffs allege that they have suffered emotional distress as a result of HOVIC's act of exposing Purjet, and therefore Carrie Renee, to asbestos, thus increasing their chances of contracting a disease. HOVIC's acts are characterized alternatively as intentional and negligent. We will examine these allegations separately.

(1) Intentional Infliction of Emotional Distress.

Restatement (Second) of Torts § 46 defines this tort:

> Emotional Distress
> 1. One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
> 2. Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress.
> (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
> (b) to any other person who is present at the time, if such distress results in bodily harm. [FN1]

Purjet must prove intent, injury and the requisite conduct to warrant denial of HOVIC's motion.

As for injury, Comment j to § 46 states:

> Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant reactions such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea. It is only where it is extreme that the liability arises.... The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it....

*See Moolenaar v. Atlas Motor Inns, Inc.,* 616 F.2d 87, 89 (3d Cir.1980) (indicating the requisite severity).

The requisite conduct is described in Comment d:

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community ... The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.

***3** HOVIC argues correctly that the pleadings are devoid of any evidence indicating that Purjet has suffered the intense psychological distress required to maintain a claim under § 46 and comment j. Indeed, he continues to smoke cigarettes in spite of the effect asbestos may have upon the respiratory

system.

Moreover, we find Purjet has failed to meet the intent requirement. It is undisputed that HOVIC moved quickly and responsibly to remove the asbestos from the refinery once it had knowledge of the hazard. The conduct requirement is lacking for the same reasons.

(2) Negligent Infliction of Emotional Distress.

Restatement (Second) of Torts § 313 defines this cause of action:

> Emotional Distress Unintended
> 1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor
> (a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and
> (b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.
> 2) The rule stated in Subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.

Because neither plaintiff has alleged that the emotional distress resulted in physical injury, we find that § 436A of the Restatement is controlling. It provides:

> Negligence Resulting in Emotional Disturbance Alone
> If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.

As with the enhanced risk cause of action, courts examining the issue of whether exposure to carcinogens and the resulting fear of developing a disease have distinguished the situation where the plaintiff manifests an injury. In *Ayers, supra,* the court held that an action for "cancerphobia" would not lie unless "emotional injury as evidenced by substantial bodily injury or sickness has resulted from knowledge that plaintiffs have ingested contaminents." *Id.*, 461 A.2d at 189.

The Pennsylvania courts have held that a plaintiff who was exposed to asbestos carried on a family member's clothing could maintain emotional distress action only if they developed a disease. *Cathcart v. Keene Industrial Insulation,* 324 Pa.Super. 123, 471 A.2d 493, 508 (1984); *Berardi v. Johns-Mansville Corp.*, 334 Pa.Super. 36, 482 A.2d 1067, 1071-72 (1984) [distinguishing *Plummer v. United States,* 580 F.2d 72 (3d Cir.1978), where plaintiffs were actually infected with tubercle bacilli]. *See also Gideon v. Johns-Mansville Sales Corp.*, 761 F.2d 1129, 1138 (5th Cir.1985); *Wisniewski v. Johns-Mansville Corp.*, 759 F.2d 271 (3d Cir.1985); *Tysenn v. Johns-Mansville Corp.*, 517 F.Supp. 1290 (E.D.Pa.1981). Once again, because we find no dispute regarding the present absence of an actual injury, summary judgment must be granted in favor of HOVIC on the issue of negligent infliction of emotional distress.

C. *Diagnostic Testing*

***4** Finally, the Purjets assert that they are entitled to periodic medical monitoring. Such relief is subject to the damage requirement and, therefore, is appropriate only when a demonstrable injury caused by a negligent act increases the probability of developing ailments in the future. This rule is illustrated by *Friends for All Children v. Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C.Cir.1984), which concerned the enhanced risk of developing epilepsy as a result of a serious head injury. In granting the plaintiffs' request for diagnostic treatment there, the court distinguished the chemical exposure cases on the grounds that there was no actual injury. *Id.* at 826.

In *Ayers v. Jackson Township,* 202 N.J.Super. 106, 493 A.2d 1314 (NJ Super A.D.1985), the appellate court reversed an award for medical screening, reasoning that physical manifestation of a disease was required to justify imposing upon the defendant the plaintiffs' lifelong costs of cancer detection. *Id.*, 493 A.2d at 1323.

In support of their claim, the Purjets cite *Askey v. Occidental Chemical Corp.*, 102 A.D.2d 130, 477 N.Y.S.2d 242 (4 Dept.1984), where the court held that medical monitoring could be recovered if the plaintiffs, Love Canal property owners, could establish with a "reasonable degree of medical certainty that such expenditures are 'reasonably anticipated' to be incurred by reason of their exposure" to toxic chemicals. *Id.*, 477 N.Y.S.2d at 247.

We are bound, however, to follow the Restatement's rule that actual injury is an indispensable element of a tort cause of action and, therefore, hold that the Purjets have failed to state a valid claim. [FN2]

III. CONCLUSION

A tort claim will not lie in the absence of a demonstrable injury. As a result, we hold that the mere exposure to asbestos is insufficient to state a cause of action.

FN1. Preliminarily we note that subsection (2)(a) bars Carrie Renee Purjet's claim due to the bystander's requirement of presence when the impact occurred.

FN2. 1 V.I.C. § 4 provides:
Application of common law; restatements.
The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

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